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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

J. WILLIAM HAYDEN,
Petitioner,

VS.

LA-Z-BOY CHAIR CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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41 pp

QUESTIONS PRESENTED

1. Did the Seventh Circuit err in holding that petitioner had to be an employee of respondent in order to assert a cause of action under the Age Discrimination in Employment Act?

2. Did the Seventh Circuit err in holding that, simply because he was labelled as an "independent contractor" of respondent, petitioner could not maintain a cause of action under the Age Discrimination in Employment Act against respondent?

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No.

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OCTOBER TERM, 1993

J. WILLIAM HAYDEN,
Petitioner,

VS.

LA-Z-BOY CHAIR CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner J. William Hayden respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this lawsuit on November 3, 1993.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reproduced in Appendix A, *infra*, while the order and judgment granting summary judgment to respondent in the United States District Court for the Northern District of Indiana (Lee, William C., J.) is produced in Appendix B, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1993. This petition was filed within ninety days of that date as required by 28 U.S.C. § 2101(c); Sup.Ct. R. 12, 13 and the

jurisdiction of this Court to review the decision below is therefore invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Age Discrimination in Employment Act ("ADEA") (29 U.S.C. § 621 *et. seq.*) provides, in relevant part:

> It shall be unlawful for an employer . . . to . . . discriminate against any individual with respect to his compensation, terms, or privileges of employment, because of such individual's age. . .

29 U.S.C. § 623 (a) (1).

STATEMENT OF THE CASE

A. How the Federal Question Was Presented

The jurisdiction of the district court was invoked under 29 U.S.C. § 623 and 28 U.S.C. § 1331.

B. Statement of Facts

Petitioner J. William Hayden is a sixty-one year old male. Between 1968 and December 31, 1990, he was an independent sales representative for respondent, a nationwide seller of furniture products. In fact, he was the exclusive sales representative of those products for 33 counties in northern Indiana, 7 counties in Ohio and 2 in Michigan and he sold no products other than those of respondent. In 1984, petitioner incorporated his sales business under the name of J. William Hayden, Inc. and, after being formed, that business employed other persons in addition to him.

The petitioner's business was carried out under annual written contracts with the respondent. After he incorporated his business, the contracts were solely between respondent and J. William Hayden, Inc. Each of the contracts had identified the Independent Sales Representative as an independent contractor. On December 4, 1990, respondent informed petitioner that he could not sell their products after 1990.

C. The Proceedings Below

Petitioner filed this action alleging, *inter alia,* that respondent had unlawfully terminated him after twenty-three years of serving that company as an independent sales representative by terminating him in violation of ADEA Accordingly, jurisdiction was conferred on the district court under 29 U.S.C. § 623. The action was brought in the United States District Court for the Northern District of Indiana because petitioner resided in that district and respondent, a Michigan corporation, also did business there.

Petitioner's complaint alleged that he "had developed ongoing relationships with customers in his sales territory" and found himself in the position of being "completely controlled in his access to them and the employment opportunities which they represented" by respondent. He further alleged that he was a member of those "persons who ADEA is intended to benefit" and that his termination "was one in which age was a determining factor."

Respondent, who had initially denied liability, moved for summary judgment upon the completion of discovery. On October 28, 1992, the district court granted the motion, dismissed petitioner's ADEA claim and further declined to exercise jurisdiction over the pendant state law claims which had been asserted. The United States Court of Appeals for the Seventh Circuit affirmed the district court's judgment on November 3, 1993 holding that, as an independent contractor, petitioner had no standing to assert an ADEA claim against respondent.

REASONS FOR GRANTING THE WRIT

We bring this case to the attention of the Court and request review of the court of appeals decision because we believe that decision, as it presently stands, impermissibly places legal form over legal substance and serves to deny a group of which we shall almost all ultimately be members-older Americans-the access to the federal courts which Congress intended for them. The issues raised by this case are clearly of importance "to the public as distinguished from" importance to the particular "parties" involved. (*Layne & Bowler Corp. v. Western Well Works'*, 261 U.S. 387,393 (1923); *Rice V. Sioux City Cemetery,* 349 U.S. 70,79 (1955)). This is so, if for no other reason, because of the sheer number of people who are potentially effected by such an unjustified denial of their rights to legally redress wrongs resulting simply from their age.

It is universally conceded that the median age of the American population is increasing, meaning, of course, that the population of this country is simply growing older. Knowing this, it is helpful, we think, to remember why the ADEA was passed in the first place. At the time of the passage of ADEA, twenty-seven percent of all unemployed workers, and forty percent of the long term unemployed were over the age of forty-five. ("Special Message Proposing Programs for Older Americans", *Pub. Papers* 37 (Jan. 23, 1967)). Furthermore, a study done by the Secretary of Labor shortly before ADEA's passage found that, of all private employment opportunities available, fifty percent were closed to applicants over fifty-five, and twenty-five percent to those over forty-five. (Ibid.) Even if there has been improvement in this area since then, the above-figures show the size of the population effected by an impermissible denial of access to the courts to redress age discrimination.

Those same figures underscore the importance of the statute involved-ADEA. The decision below is to our knowledge the fourth court of appeals decision to hold that ADEA can never apply to someone labelled an independent contractor. (*See, E.E.O.C. v. Zippo Manufacturing Co.,* 713 F.2d 32 (3rd Cir. 1983); *Garrett v. Phillips Mills, Inc.,* 721 F.2d 979 (4th Cir. 1983); and *Hickey v. Arkla Industries Inc.,* 699 F.2d 748 (5th

Cir. 1983)). Thus, a clear pattern is emerging about the views of the lower courts on this issue. However, none of the litigants in those cases requested this Court to grant certiorari to review those decisions. Therefore, if these cases are wrong, as we believe them to be, they, if allowed to stand, represent a serious hindrance to the proper administration of an important federal statute. (*United States v. Ruzicka,* 329 U.S. 287 (1946); *Rothensies v. Electric Battery Co.* (1946)).

Furthermore, the court of appeals in this case (A-12) and the one in *Hickey,* supra., 699 F.2d at 753, felt that the matter was so clearcut that it would "take an act of congress" before anyone upon whom the potentially artificial label of "independent contractor" was attached could assert an ADEA claim. If it is indeed that clearcut, then there is no reason for the Court to hear this case. However, we believe the matter is far from clearcut, making it, because of all the factors set forth above, precisely the type of case which this Court should hear and decide.

Our fundamental problems with the decisions in this case, as they now stand, run as follows: for nearly a quarter of a century, petitioner sold the products of respondent, and no one elses, in a certain geographical area. Then he ceased making such sales. Not voluntarily. But because the respondent told him he could no longer make such sales. Whatever other employment opportunities might be open to him, the one that he had devoted himself to for almost a quarter of a century was closed. However, the decisions below essentially hold that the acts of respondent, who is concededly an "employer" for purposes of ADEA (29 U.S.C. § 623 (a) (1)), do not effect the "privileges of employment" (ibid.) of petitioner which seems to us to be simply wrong.

Because of his numerical age, it cannot be disputed that, as his complaint states, petitioner is a member of "those persons who ADEA is intended to benefit" and, because of the decisions below, we will not, unless this Court acts, ever know whether a jury would decide that his termination "was one in which age was a determining factor." Therefore, the legal question which is most significant, on this petition is whether it makes any legal difference if, as petitioner's complaint alleges, he "had developed ongoing relationships with customers in his sales territory" and

found himself in the position of being "completely controlled in his access to them and the employment opportunities which they represented" by respondent.

Remedies for violations of the ADEA were adopted from the Fair Labor Standards Act ("FLSA") (29 U.S.C. § 201 et. seq.) (29 U.S.C. § 626(b)) inasmuch as the former is an amendment to the latter. The FLSA defines "employ" as including "suffer[ing] or permit[ing] to work." (29 U.S.C. § 203 (g)). Somewhere in petitioner's work, someone-his customers, his supplier (respondent) or his corporation-was suffering or permitting him to work. Therefore, he was employed by them. Not surprisingly, there is no evidence in the record that it was his corporation that ended this status. The only evidence is that it was respondent. ADEA has always only required that there be an "employer" who cannot discriminate and an 'individual' who cannot be discriminated against. (29 U.S.C. § 623 (a) (1)). That is what is present in this case. However, the presently existing decision leaves him free-floating in some undefined employment vortex.

This issue has been presented several times in cases brought under Title VII of the Civil Rights Act (42 U.S.C. § 2000e et. seq.) These decisions are useful here because "courts have repeatedly relied upon Title VII precedent in interpreting the scope of ADEA." (*EEOC v. KDM School Bus Co.,* 612 F.Supp. 369, 373, ftn. 12 (D.C.N.Y. 1985). These cases have concluded that the "type of relationship" required for a Title VII action to be maintained "need not link together the plaintiff and the defendant." (*Vakharia v. The Swedish Hospital,* 765 F.Supp. 461, 463 (N.D. Ill. 1991).

The line of decisions reaching this conclusion originated with the case of *Sibley Memorial Hospital v. Wilson,* 488 F.2d 1338 (D.C. 1973). In that lawsuit, a self-employed male nurse who alleged that a hospital had refused to refer him to female patients in need of nursing services was allowed to proceed with a Title VII action against the hospital notwithstanding the fact that no "employee relationship" existed with the hospital. The court concluded that parties other than a plaintiff's actual or potential employers may be liable for employment rights violations if they

"control the plaintiff's access to employment and deny that access based on unlawful criteria." (Id. at 1342). The court stated:

> Control over access to the job market may reside, depending upon the circumstances of the case, in a labor organization, an employment agency, or an employer as defined in Title VII; and it would appear that Congress has determined to prohibit each of these from exerting any power to foreclose, on invidious grounds, access by any individual to employment opportunities otherwise available to him. To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.

Id. at 1341. In reaching this conclusion, the Court's analytical starting point was Title VII's statutory language. As the court noted, Section 2000e-2 (a) does not use the term "employee" but refers to "any individual" (ibid.) and, in adopting Title VII, Congress clearly intended to "achieve *equality of employment opportunities*" and to "provide equal access to the job market" for covered persons. (Id. at 1340-41) (Emphasis in original) citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429, 91 S.Ct. 849, 852, 28 L.Ed. 2d 158 and *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir.), cert denied 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed. 2d 267 (1971)). This same logic applies to ADEA.

Shortly after the decision in *Sibley*, a district court reached a similar conclusion with regard to a driver-trainer of harness horses who was denied a license to race those horses by the New Hampshire Racing Commission and was further denied a stall at the race track by the New Hampshire Trotting Commission. Clearly, neither state agency employed the plaintiff in that lawsuit. The owners of the horses did. However, in *Puntolillo v. New Hampshire Racing Commission*, 375 F.Supp. 1089 (D. N.H. 1974), the district court, following, *Sibley*, denied the state agency defendants' Motion to Dismiss the driver-trainer's Title VII action.

Furthermore, in *Paradizi v. Cullman Medical Center*, 838 F.2d. 1155 (11th Cir. 1988), an Iranian physician was allowed to assert a Title VII action against a hospital which denied him staff privileges where he was unable to finalize an employment contract with a professional corporation because of the denial of those privileges. Even more comparable to the action now before this Court is *Gomez v. Alexian Brothers of San Jose*, 698 F.2d. 1019 (9th Cir. 1983).

In *Gomez*, the plaintiff was an Hispanic physician who practiced medicine as an employee of a professional corporation. He alleged that the failure of the defendant hospital to award an Emergency Room contract to him, because of his national origin, was a Title VII violation. Defendant, in that case, contended, as does the respondent in this case, that plaintiff lacked standing to assert his claim because "an independent contractor relationship was contemplated" between the parties. (*Gomez*, supra. at 1021). The court, in rejecting this argument, reasoned as follows:

> The fact that the plaintiff continues as an employee of [the corporation] does not mean that the employment relationship between [the corporation) and plaintiff has not been interfered with. The conditions of the plaintiff's employment are different than they would have been if he had not been discriminated against. Defendant does not dispute that the hospital is an employer under Title VII, and that plaintiff is an employee of [the corporation]. Moreover, the Act does not use the term "employee." The phrase is rather, the "person aggrieved"; and that term can certainly be taken as comprehending individuals who do not stand in a direct employment relationship with an employer.

Id. at 1021 citing *Sibley*.

As one District Court phrased the consideration, the focus should be placed "on a plaintiff's exposure to harm *in his compensation*, or in the terms, conditions or privileges of his employment, from an employer's discriminatory practices." (*Mitchell v. Tenney*, 650 F.Supp. 703, 708 (N.D. Ill. 1986) citing *Doe on behalf of Doe v. St. Joseph's Hospital*, 788 F.2d. 411, 425 (7th Cir. 1986) (Emphasis added)).

In this case, assuming everything that respondent has maintained, petitioner's "harm [to] his compensation" has been total due to an "employer's discriminatory practices" even though that employer may not have been, strictly speaking, appellant's employer. The court, in *Mitchell*, supra., went on to note that "the loss of one set of staff privileges [even though the plaintiff could theoretically go to another hospital] was enough to significantly affect her employment opportunities." (*Mitchell*, supra., 650 F.Supp. at 709).

In *Doe*, the court of appeals also discussed one aspect of independent contractor considerations as follows:

> In *Pao* [*Pao v. Holy Redeemer Hospital*, 547 F.Supp. 484 (E. D. Penn. 1982) the court placed the word "employers" within quotation marks, thus indicating that a common law employment relationship is not required between the physician and her patients. Indeed we note that the common law independent contractor/employee test is often not applied to antidiscrimination legislation, because "it is considered inconsistent with the remedial purposes behind such legislation." *Mares v. Marsh*, 777 F.2d 1066, 1067 n. 1 (5th Cir. 1985).

788 F.2d at 425, ftn. 28. Moreover, the court further notes in *Doe*, supra., that Title VII, like ADEA is "broad" and does not use the term "employee" instead, again like ADEA, referring to "any individual." Id. at 422. The court then goes on to reason as follows:

> There are no indications that "any individual" should be read to mean only an employee of an employer. (footnote omitted) . . . Hence, the argument that Doe is not an "employee" of the hospital is not dispositive. Further, Title VII prohibits discrimination not only with respect to condition of employment but also with respect to "privileges of employment." . . . The courts have held that Title VII should be construed "liberally so as to further the goals and purposes of eliminating discrimination in employment." *Unger v. Consolidated Foods Corp.*, 657 F.2d 909, 915 n. 8 (7th Cir.1981), vacated on other grounds, 456 U.S. 1002, 102 S.Ct. 2288, 73 L.Ed.2d

> 1297 (1982); see, e.g., *Martinez v. Orr*, 738 F.2d F.2d 1107, 1110 (10th Cir. 1984; *Armbruster, v. Quinn*, 711 F.2d 1332, 1336 (6th Cir. 1983); *Baker v. Stewart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977.)

788 F.2d at 422. Finally, in *Doe*, the court observed that:

> [O]ther circuits have held that an "employer," for purposes of a Title VII claim may be "any party who significantly affects access of any individual to employment opportunities, regardless whether that party may technically be described as the "employer" of an aggrieved individual as that term has generally been defined at common law." *Spirt v. Teachers Insurance and Annuity Association*, 691 F.2d 1054, 1063 (2d. Cir. 1982) (quoting *Vanguard Justice Society, Inc. v. Hughes*, 471 F.Supp. 670, 696 (D.Md.1979)), vacated on other grounds, 463 U.S. 1223, 103 S.Ct. 3565, 77 L.Ed. 2d 1406 (1983); see, e.g., *Gomez*, supra., 698 F.2d at 1021; *Livingston v. Ewing*, 601 F.2d 1110, 1114 (10th Cir.) cert. denied, 444 U.S. 870, 100 S.Ct. 147, 62 L.Ed.2d 95 (1979).

788 F.2d at 424.

Doe, Mitchell and *Gomez* by no means stand alone in their view that one whose access to customers or patients may still have suffered damages even if he or she can still find other customers or patients. Another decision which rejects this logic is *Armarnare v. Merrill, Lynch, Pierce, Fenner & Smith*, 611 F.Supp. 344 (D.C.N.Y. 1984). In that case, plaintiff brought a Title VII case against her employment agency, Mature Temps, and her temporary employer, Merrill Lynch.

The court, in that action, in addition to rejecting Merrill Lynch's arguments that the plaintiff had no standing to sue them because she was not an employee of theirs, also, after citing *Gomez*, endorsed the following view of liability against Merrill Lynch: "Even if plaintiff remains an employee of Mature Temps and continues to receive temporary assignments at other companies, she asserts a claim for loss of opportunity to work for Mature Temps as an administrative assistant at Merrill Lynch." (Id. at 349-50).

Therefore, whether one uses the precise analysis set forth above or finds that there was an indirect employment relationship here because of respondent's control over petitioner's access to customers (*Mitchell*, supra., 765 F.Supp. at 464), we submit that the "broad remedial purposes" of ADEA will be best served by declining to invoke the restrictive standard for the assertion of a claim under that statute which the court below imposed. These decisions demonstrate that the view taken by the Seventh Circuit unduly restricts the rights of petitioner simply because of an artificial label-independent contractor-which has been attached to him. However, cases under the ADEA have so far followed a different, and we and others believe, an incorrect path. (*See*, "Choice of a Test for Coverage of the Age Discrimination in Employment Act," 64 Boston University Law Review 1145 (1984) from which several of the citations in this petition were derived).

It should be remembered that, when Congress wanted to exclude independent contractors from a statute, such as the National Labor Relations Act, it did so explicitly. (29 U.S.C. § 152(3)). Without such a specific disclaimer, courts have properly given liberal interpretation to "broadly humanitarian" statutes such as this one. (*Armbruster v. Quinn*, 711 F.2d 1332,1341 (6th Cir. 1983). However, the path that the courts have been following up until now is opposed to that and is need of correction. It is the type of correction which this Court was made to provide and we ask it to do so now with this case.

CONCLUSION

As Alfred Lord Tennyson put it, aging "has its honor and its toil." Part of that toil is the kind of discrimination which was addressed in ADEA and the rights which were supposedly insured by it should not emasculated simply by the use of artificial labels such as "independent contractor." For the foregoing reasons and based upon the foregoing authorities, we respectfully request that this petition be granted.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 92-3863

J. WILLIAM HAYDEN,

Plaintiff-Appellant,

v.

LA-Z-BOY CHAIR COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, Fort Wayne Division.
No. 91 C 177—William C. Lee, *Judge.*

ARGUED SEPTEMBER 9, 1993—DECIDED NOVEMBER 3, 1993

Before CUMMINGS, COFFEY, and ROVNER, *Circuit Judges.*

COFFEY, *Circuit Judge.* J. William Hayden ("Hayden"), 61 years of age, was an independent sales representative for La-Z-Boy Chair Company ("La-Z-Boy") for twenty-two years. In December 1990 La-Z-Boy decided not to renew Hayden's contract and replaced him with a 44-year-old independent sales representative. Hayden filed suit, alleging that La-Z-Boy's decision not to renew his contract violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* The district court granted summary judgment for La-Z-Boy on the grounds that Hayden was not covered by the ADEA.

We affirm.

I. BACKGROUND

La-Z-Boy is a furniture manufacturer that contracts with independent sales representatives to sell its products to retailers on a straight commission basis. The rights and duties of these sales representatives are spelled out in the one-year "Independent Sales Representative's Agreement" that the sales representatives sign. Pursuant to this written contract, the parties agreed that 1) Hayden would be responsible for calling on retail furniture stores in certain counties in northern Indiana, Ohio, and Michigan to service established accounts and to establish new accounts; 2) that Hayden was "not an agent or employee" of La-Z-Boy; 3) that either party could terminate the agreement at any time without cause by giving the other party thirty days written notice; and 4) that Hayden could request La-Z-Boy's permission to carry other manufacturers' non-competing lines of merchandise.

In 1984, Hayden incorporated himself as the sole shareholder and only full-time employee of "J. William Hayden, Inc." Thereafter, La-Z-Boy made Hayden's commission payable to J. William Hayden, Inc., which in turn paid Hayden a salary. In December 1990 La-Z-Boy informed Hayden that it would not be renewing his December 1989 Independent Sales Representative Agreement. The company named Frank Stultz, its 44-year-old West Virginia independent sales representative, to take over Hayden's territory, and Hayden filed this suit under the ADEA.

After the completion of discovery, La-Z-Boy moved the court for summary judgment. The company argued that Hayden was an independent contractor, not an employee, and therefore fell outside the protection of the ADEA, and further argued in the alternative that even if Hayden was covered by the statute, he had failed to create a genuine issue of material fact on the question of whether La-Z-Boy's articulated reasons for refusing to renew his

contract were merely a pretext for age discrimination.[1] The trial court granted summary judgment on alternative grounds.

II. ISSUES

Hayden argues that the trial court erred in finding that he was not covered by the ADEA and in finding that he had failed to present sufficient evidence to create a genuine issue of material fact. Because we agree with the district court that the plaintiff is not covered by the ADEA, we need not address whether the plaintiff could have demonstrated the existence of a genuine issue of material fact.

III. DISCUSSION

We review summary judgment orders *de novo*, viewing the record and all reasonable inferences drawn from it in the light most favorable to the party opposing the motion. *Anderson v. Stauffer Chemical Co.*, 965 F.2d 397, 400 (7th Cir. 1992) (citing *Karazanos v. Navistar Int'l Transp. Corp.*, 948 F.2d 332, 335 (7th Cir. 1991)). Summary judgment is appropriate only when the materials before the court demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ. P. 56(c). In other words, the record must reveal that "no reasonable jury could find for the non-moving party." *An-*

[1] Among the reasons La-Z-Boy offered for its decision not to renew Hayden's contract were (1) the relatively flat sales in Hayden's territory; (2) Hayden's failure to sell the desired mix of sleepers, sofas and recliner sofas; (3) customer complaints indicating that Hayden rarely called on some of his customers; (4) an investigation by La-Z-Boy's district sales manager, Dwight Dorwart, which confirmed that Hayden had a poor relationship with many of his customers and failed to conduct sales meetings with them; and (5) Hayden's failure to submit a plan to correct these problems or even submit a plan to do so despite being placed on three separate six-month periods of probation over the years.

derson, 965 F.2d at 400 (quoting *Karazanos*, 948 F.2d at 335).

In granting summary judgment, the district court reasoned that even if an ADEA plaintiff did not have to show that he was an employee of the organization he was seeking recovery from, he at least had to establish the existence of some protected employment relationship with which the defendant had allegedly interfered. The only employment relationship Hayden sought to establish in district court was his relationship with his own corporation, of which he was the sole shareholder. The court found that the ADEA did not protect Hayden's employment relationship with his own corporation and that he had no other employment relationship with any third party. Therefore, the court concluded, Hayden could not recover under the Act as a matter of law.

The Age Discrimination in Employment Act provides:

> "It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

29 U.S.C. § 623(a)(1).

The statute thus prohibits an employer from discriminating against its employees on the basis of age, but does not cover independent contractors. *See Garrett v. Phillips Mills, Inc.*, 721 F.2d 979, 980 (4th Cir. 1983) ("plain reading of the ADEA indicates that an 'individual' only has a cause of action under this provision if he is an 'employee' at the time of his termination"). Although courts have uniformly required that a person seeking to recover under the ADEA be an employee of the same employer he is seeking to recover from, Hayden attempts to furrow new fields of legal theory and argues that a line of Title VII cases provides persuasive authority that the ADEA should be read as permitting an individual (Hayden) to recover for an employer's (La-Z-Boy) interference with the individual's employment relationship with his

own corporation (J. William Hayden, Inc.). Here Hayden complains that La-Z-Boy's refusal to renew his Independent Sales Representative Agreement cut off the salary he received from J. William Hayden, Inc.

Hayden's theory that the ADEA protects his employment relationship with his own corporation finds no support from our research in either statute or case law. In *EEOC v. Zippo Manufacturing Co.*, 713 F.2d 32 (3rd Cir. 1983), for example, Zippo's district sales managers (some of whom had formed corporations in which they were the sole shareholder) worked as independent contractors before being terminated shortly after they turned sixty-five. The Third Circuit held that "if appellants were not Zippo employees, ADEA is not applicable to their cause and their allegation that Zippo violated ADEA in terminating them because they reached the age of 65 must be rejected." *Id.* at 35.

In *Hickey v. Arkla Industries, Inc.*, 699 F.2d 748 (5th Cir. 1983), the plaintiff was a former Arkla "manufacturer's sales representative" who had signed a Manufacturer's Sales Representative Agreement with Arkla that designated him as an independent contractor. The fact that Hickey had established Perry Hickey Enterprises as the corporate vehicle for his sales of Arkla products, and thus presumably could have been found to have had an "employment relationship" with his own corporation, was not enough to bring him within the ADEA. The Fifth Circuit affirmed the district court's order granting Arkla Industries' motion for a directed verdict, holding that "Hickey must be an employee of Arkla in order to have a cause of action under the ADEA." *Id.* at 753.

Hayden nevertheless argues that a broader reading of the ADEA is indicated by a line of cases interpreting the scope of Title VII of the Civil Rights Act of 1964.[2] Title VII provides that:

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[2] *See Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973); *Gomez v. Alexian Brothers of San Jose*, 698 F.2d 1019

(Footnote continued on following page)

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. § 2000e-2(a)(1).

Because Title VII and the ADEA share "a similar purpose—to stamp-out discrimination in various forms—cases construing the definitional provisions of one [statute] are persuasive authority" when interpreting the provisions of the other. *Hyland v. New Haven Radiology Associates, P.C.*, 794 F.2d 793, 796 (2nd Cir. 1986), citing *Lorilland v. Pons*, 434 U.S. 575, 584 (1981) ("the prohibitions of the ADEA were derived *in haec verba* from Title VII"); *see also Rogers v. Sugar Tree Products, Inc.*, No. 92-2990, slip op. at 6 (7th Cir. Oct. 5, 1993) (the Title VII standard for determining whether a business relationship is one of employer-employee applies equally to a claim under the ADEA).

Hayden concedes in his brief that "he has never alleged that he was an employee of La-Z-Boy." But he points out that this court has recognized that Title VII applies where an employer "discriminatorily interfer[es] with an individual's employment opportunities with another employer." *Doe on Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 411, 422 (7th Cir. 1986) (citing *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973). And he cites

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[2] *continued*
(9th Cir. 1983); *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 611 F. Supp. 344 (S.D.N.Y. 1984); *Doe on Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 411 (7th Cir. 1986); *Mitchell v. Tenney*, 650 F.Supp. 703 (N.D. Ill. 1986); *Pardazi v. Cullman Medical Center*, 838 F.2d 1155 (11th Cir. 1988). We discuss these opinions *infra*.

a Ninth Circuit case, *Gomez v. Alexian Brothers of San Jose*, 698 F.2d 1019 (9th Cir. 1983), for the further proposition that even an individual's "employment" relationship with his own corporation is sufficient to bring him within Title VII.

The plaintiff in *Gomez* was a Hispanic physician who practiced medicine as an employee of a professional corporation. When he alleged that the defendant hospital's refusal to award him a contract naming him the director of the hospital's emergency room violated Title VII, the hospital argued that he lacked standing to assert a Title VII claim because nothing more than an independent contractor relationship had ever been contemplated between the physician and hospital. The Ninth Circuit rejected this argument and allowed the plaintiff's suit to proceed on the basis that Title VII has been interpreted "to encompass situations in which 'a defendant subject to Title VII interferes with an individual's employment opportunities with another employer.' " *Id.* at 1021 (*quoting Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 883 n.3 (9th Cir. 1980)).

The court reasoned that Gomez had established his standing to sue under Title VII by alleging that the hospital's discriminatory refusal to contract with him had

> "denied him the opportunity to be employed by [his professional corporation] as director of defendant's emergency room. The fact that plaintiff continues as an employee [of his professional corporation] does not mean the employment relationship between [Gomez and his professional corporation] has not been interfered with. The conditions of plaintiff's employment are different than they would have been had he not been discriminated against. Defendants do not dispute that the hospital is an employer under Title VII, nor that plaintiff is an employee [of his professional corporation]."

Gomez, 698 F.2d at 1021.

Applying the *Gomez* rationale to this case, Hayden contends, would permit him to sue under Title VII: La-Z-

Boy is "an employer" and Hayden is "an employee" of J. William Hayden, Inc. Therefore, Hayden reasons, since Title VII would protect his employment relationship with his own corporation, so should the ADEA.

Initially, we note that we disagree with Hayden's assumption that Title VII standing automatically confers ADEA standing. As the district court noted in its order granting summary judgment, "Although the Seventh Circuit Court of Appeals has held that the language of Title VII is broad and provides protection to persons who are not employees of the employer, the Seventh Circuit has not yet decided whether the ADEA should likewise be given a broad reading." But although the question of whether the ADEA should be interpreted as broadly as Title VII is an important one, it is not before us in the present appeal because a close reading of the cases discloses that, even under Title VII, a plaintiff may not recover on the basis that an employer has interfered with the plaintiff's "employment relationship" with his wholly owned corporation. The Ninth Circuit distinguished *Gomez* on just this basis in *Mitchell v. Frank R. Howard Memorial Hospital*, 853 F.2d 762 (9th Cir. 1988), *cert. denied*, 489 U.S. 1013 (1989). The plaintiff in *Mitchell* (a radiologist) sought to assert a Title VII claim against a hospital that had terminated the contract under which he provided the hospital with radiology services. The radiologist cited *Gomez* for the proposition that, by terminating his contract, the hospital ("an employer") had disrupted his "employment relationship" with his wholly owned professional corporation. The Ninth Circuit was not persuaded:

> "Dr. Mitchell argues that the hospital interfered with his employment relationship with the professional corporation of which he is the sole shareholder. We reject this argument because we believe that *the relationship between an individual and his wholly owned professional corporation is not an employment relationship that Congress intended to protect under Title VII*. . . . *Gomez* . . . upon which Dr. Mitchell relies, is clearly distinguishable. *Gomez* involved a corpora-

> tion that employed a number of doctors who rendered medical services as part of the corporation's group medical practice. . . . In contrast, Dr. Mitchell is both the sole shareholder and the sole employee of his professional corporation."

Mitchell, 853 F.2d at 767 (emphasis added).

We agree with the Ninth Circuit that Title VII does not protect an individual's "employment relationship" with his wholly owned corporation. To hold otherwise would mean that an independent contractor with no relevant employment relationships with the defendant (or anyone else) could bring himself within the protection of the ADEA simply by incorporating. In fact, each of the Title VII cases Hayden relies upon is distinguishable on that basis: In each case upholding a plaintiff's right to sue, the persons or entities with whom the plaintiffs were allegedly employed were third parties, not corporations owned wholly by the plaintiffs in the manner that Hayden owns and operates J. William Hayden, Inc. *See Pardazi v. Cullman Medical Center*, 838 F.2d 1155 (11th Cir. 1988) (Title VII protects physician's prospective employment with a professional corporation in which another physician was the principal); *Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 611 F. Supp. 344 (S.D.N.Y. 1984) (Title VII protects temporary employee's employment with the temporary agency); *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973) (Title VII protects employment of private duty nurse and physician by third-party patients).

Finally, a close reading of the plaintiff's opening brief reveals, in a single clause in the concluding paragraph of his ADEA standing argument, one—or perhaps two—additional arguments presented for the first time on appeal. The paragraph reads, in its entirety:

> "In sum, whether one uses the precise analysis set forth above *or finds that there was an indirect employment relationship here because of appellee's control over appellant's access to customers* [citing *Mitchell v. Tenney*, 650 F. Supp. 703 (N.D. Ill. 1986)], we

> submit that the broad remedial purposes of ADEA will be best served by declining to invoke the restrictive standard for the assertion of a claim under that statute which the court below imposed."

(Emphasis added.)

Whether by this the plaintiff is attempting to infer that he might be viewed as an "indirect" La-Z-Boy employee, or whether (as his reply brief suggests) he means to imply that he had some kind of protected employment relationship with the furniture dealers on whom he called as an independent sales representative for La-Z-Boy, neither issue has been preserved for our review. "It is well-established that an issue not raised in district court is waived on appeal," *Evans v. Fluor Distribution Cos., Inc.*, 799 F.2d 364, 366 (7th Cir. 1986), and a review of Plaintiff's Substituted Brief in Opposition to Summary Judgment discloses that Hayden specifically disavowed making any arguments to the district court on the basis of his alleged "indirect employment" relationships. "We have *not* argued," Hayden advised the court, "though we might with ample justification, that an indirect employment relationship existed between plaintiff and defendant . . ." (emphasis added). The trial judge took the plaintiff at his word, stating in his order granting summary judgment that "The only employment relationship present in the case at bar is Hayden's relationship with his corporation, of which he is the sole shareholder."

Having decided not to argue before the district court the issue of whether he might have an "indirect" employment relationship with either La-Z-Boy or the furniture dealers who purchase La-Z-Boy products, Hayden may not raise that issue for the first time on appeal. *Evans*, 799 F.2d at 366. *See also Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 235 (7th Cir. 1991) (issue not raised in motion opposing summary judgment is waived on appeal from grant of summary judgment).

We will note, however, that there is no merit to the plaintiff's arguments in any event because the record makes clear that Hayden was not an indirect employee of either

La-Z-Boy or the furniture dealers. In determining whether an employer-employee relationship exists, we look to the following factors:

> "(1) the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace, (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations, (4) method and form of payment and benefits, and (5) length of job commitment and/or expectations."

Rogers v. Sugar Tree Products, Inc., No. 92-2990, slip op. at 6 (7th Cir. Oct. 5, 1993) (citations omitted).

The record discloses that Hayden's relationship to La-Z-Boy was that of an independent contractor. The La-Z-Boy Independent Sales Representative Agreement specifically provided that the representative was "not an employee or agent" of La-Z-Boy. La-Z-Boy paid Hayden (or, after 1985, J. William Hayden, Inc.) a straight commission. The defendant neither provided Hayden with an office nor reimbursed his corporation for travel, office or any other business expense. It did not provide him with insurance coverage, retirement benefits, paid sick or vacation time or other benefits. La-Z-Boy did not withhold any taxes or Social Security payments on the commission payments it made to Hayden or his corporation. Defendant did not tell plaintiff when to call on customers, require him to submit call reports, or otherwise manage the day-to-day operation of his business. Their Independent Sales Representative Agreement further specifically provided that either party could terminate the relationship upon thirty days notice, with or without cause. *Mitchell v. Tenney*, 650 F. Supp. 703 (N.D. Ill. 1986), the sole case cited by Hayden, is readily distinguishable because the defendant in that case provided the plaintiff commodity salesman with a place of business, offered a group health plan, and closely regulated his working hours. *See Mitchell*, 650 F.

Supp. at 705. Thus, under the *Rogers* test cited above, Hayden's relationship to La-Z-Boy was clearly that of an independent contractor, not that of an employee, "indirect" or otherwise.

Of course, Hayden's relationship with the furniture dealers to whom he periodically sought to sell La-Z-Boy products was even less employee-like than his relationship with La-Z-Boy. Hayden conceded in his deposition that he had no actual or prospective contractual relationship with these furniture dealers and that he remains free to sell these same dealers any (non-La-Z-Boy) furniture or other products. Thus, under the *Rogers* criteria, the dealers on whom Hayden called while working as an independent contractor for La-Z-Boy could not in any sense be said to have "employed" him.

Therefore, even if plaintiff had not waived his argument that some type of indirect employment relationship existed between himself and La-Z-Boy or between himself and the furniture dealers, we would agree with the district court's finding that "the only employment relationship present at bar is Hayden's relationship with [J. William Hayden, Inc.] of which he is the sole shareholder."

Whether ADEA coverage should be expanded to include independent contractors who elect to incorporate themselves is a question for Congress, not the courts. *See Hickey*, 699 F.2d at 753.

IV. CONCLUSION

Because there is no viable ADEA claim in this case, the district court's grant of summary judgment in favor of La-Z-Boy Chair Company is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—11-3-93

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

J. WILLIAM HAYDEN,
Plaintiff,
v.
LA-Z-BOY CHAIR CO.,
Defendant.

Civil No. F 91-177

ORDER

This matter is before the court on defendant's motion for summary judgment. The parties have fully briefed the issues and oral argument was heard on October 7, 1992. For the following reasons defendant's motion will be granted.

Summary Judgment

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). However, Rule 56(c) is not a requirement that the moving party negate his opponent's claim. *Fitzpatrick v. Catholic Bishop of Chicago*, 916 F.2d 1254, 1256 (7th Cir. 1990). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53 (1986). The standard for granting summary judgment mirrors the directed verdict standard under Rule 50(a), which requires the court to grant a directed verdict where there can be but one reasonable conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986). A scintilla of evidence in support of the non-moving

party's position is not sufficient to successfully oppose summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 2512; *In Re Matter of Wildman*, 859 P.2d 553, 557 (7th Cir. 1988); *Klein v. Ryan*, 847 F.2d 368, 374 (7th Cir. 1988); *Valentine v. Joliet Township High School District No. 204*, 802 F.2d 981, 986 (7th Cir. 1986). No genuine issue for trial exists "where the record as a whole could not lead a rational trier of fact to find for the nonmoving party." *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 322 (7th Cir. 1992) (quoting *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986)).

Initially, Rule 56 requires the moving party to inform the court of the basis for the motion, and to identify those portions of the "pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact, *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553. The non-moving party may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment. *Goka v. Bobbitt*, 862 F.2d 646, 649 (7th Cir. 1988); *Guenin v. Sendra Corp.*, 700 F.Supp. 973, 974 (N.D. Ind. 1988); *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir.), *cert. denied*, 464 U.S. 960 (1983). In ruling on a summary judgment motion the court accepts as true the non-moving party's evidence, draws all legitimate inferences in favor of the non-moving party, and does not weigh the evidence or the credibility of witnesses. *Anderson*, 477 U.S. at 249-251, 106 S.Ct. at 2511.

Substantive law determines which facts are material; that is, which facts might affect the outcome of the suit under the governing law. *Id.* 477 U.S. at 248, 106 S.Ct. at 2510. Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute. *Id.* The issue of fact must be genuine. Fed. R. Civ. P. 56(c), (e). To establish a genuine issue of fact, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1356; *First National Bank of Cicero v. Lewco Securities Corp.*, 860 F.2d 1407, 1411 (7th Cir. 1988).

The non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Id.* A summary judgment determination is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-252, 106 S.Ct. at 2512.

Discussion

Plaintiff J. William Hayden ("Hayden"), a sixty-one year old male, has asserted a claim of age discrimination under the Age Discrimination in Employment Act ("ADEA") against defendant La-Z-Boy Chair Co. ("La-Z-Boy"), a manufacturer and distributor of home furnishings and furniture. The ADEA, 29 U.S.C. § 623 (a)(1), provides that:

> It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Hayden had been an independent sales representative for La-Z-Boy from 1968 until December of 1990, when his latest one-year contract was not renewed. Hayden has also asserted state law claims for tortious interference with business relations, tortious interference with prospective economic advantage, and intentional infliction of emotional distress.

With respect to the ADEA claim, defendant argues that plaintiff is an independent contractor, and not an employee, and thus he is not covered by the ADEA. Plaintiff admits that he is not alleging that he is an employee of La-Z-Boy. Nevertheless, plaintiff insists that he is one of those persons that the ADEA is intended to benefit.

A review of the caselaw reveals that the courts have uniformly required that a person seeking to recover under the ADEA be an employee of the organization he is seeking to recover from. For example, in *EEOC v. Zippo Manufacturing Co.*, 713 F.2d 32, 33

(3d Cir. 1983), the court simply stated that "[t]he ADEA only covers employees." The Court further noted that:

> [T]he legislative history of [the ADEA], 1967 U.S. Code Cong. & Ad.News 2214-27, evinces the clear legislative intent to prohibit "age discrimination by employers against employees and applicants for employment." *Levine v. Fairleigh Dickinson University*, 646 F.2d 825, 828 (3d Cir. 1981). Therefore, if appellants were not Zippo employees, ADEA is not applicable to their cause and their allegation that Zippo violated ADEA in terminating them because they reached the age of 65 must be rejected.

Id. at 35.

Similarly, the Fourth Circuit has held that "[a] plain reading of the ADEA indicates that an 'individual' only has a cause of action under this provision if he is an 'employee' at the time of his termination." *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979, 980 (4th Cir. 1983). The Fifth Circuit, in *Hickey v. Arkla Industries, Inc.*, 699 F.2d 748, 753 (5th Cir. 1983), stated:

> [Hickey] argues that even if he is not an employee of Arkla's within the meaning of the cases, he still has a cause of action. According to him, because the ADEA covers all individuals having an economic relationship with a business entity, employee status is irrelevant. This argument is primarily based upon principles of statutory construction advanced by him, and in our considered opinion, his contentions are found to be greatly wanting, if not specious.
>
> There is no legislative history to support Hickey's contention that employee status is not required for coverage under the ADEA. Moreover, his argument defies a plain reading of the statute. Whether it would be desirable to include independent contractors within ADEA coverage is clearly a matter for Congress, and emphatically not for the courts, to decide.

Plaintiff does not dispute that, thus far, the ADEA has been held to be applicable only to persons who are "employees". Rather, plaintiff suggests that this court should adopt a liberal interpretation of the ADEA and rely on Title VII precedent in

interpreting the scope of the ADEA. Specifically, plaintiff claims that under Title VII, a person may bring a cause of action even though he is not a "traditional employee" as long as "some employment relationship" exists. In this case, the plaintiff was an employee of his own corporation, J. William Hayden, Inc. At plaintiff's request, La-Z-Boy paid Hayden's commissions to the corporation; the corporation then paid Hayden an annual salary. Plaintiff asserts that since La-Z-Boy's actions affected his employment relationship with his corporation, he may properly sue La-Z-Boy under the ADEA.

The Supreme Court has observed that the ADEA is a hybrid of both the Fair Labor Standards Act and Title VII. *Lorillard v. Pons*, 98 S.Ct. 866, 868-69 (1978). The appellate courts have looked to the standards enunciated in Title VII cases when deciding whether a plaintiff meets employee status under the ADEA or is merely an independent contractor. See e.g., *Zippo, supra* at 38. Although the Seventh Circuit Court of Appeals has held that the language of Title VII is broad[1] and provides protection to persons who are not employees of an employer, the Seventh Circuit has not yet decided whether the ADEA should likewise be given a broad reading.

In 1973, the Court of Appeals for the District of Columbia Circuit handed down *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973). *Sibley* held that the plaintiff had a Title VII claim, despite the absence of an employment relationship between the plaintiff and the defendant hospital. The Court noted that in enacting Title VII, Congress had intended to achieve equality of employment opportunities, and that

> [c]ontrol over access to the job market may reside, depending upon the circumstances of the case, in a labor organiza-

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[1]Section 1(a) of Title VII is nearly identical to Section 1(a) of the ADEA and provides that:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

> tion, an employment agency, or an employer as defined in Title VII; and it would appear that Congress has determined to prohibit each of these from exerting any power it may have to foreclose, on invidious grounds, access by any individual to employment opportunities otherwise available to him. To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone the continued use of the very criteria for employment that Congress has prohibited.

Sibley, 488 F.2d at 1341.

The Court further noted that:

> The Act defines "employee" as "an individual employed by an employer," but nowhere are there words of limitation that restrict references in the Act to "any individual" as comprehending only an employee of an employer. Nor is there any good reason to confine the meaning of "any individual" to include only former employees and applicants for employment, in addition to present employees. Those words should, therefore, be given their ordinary meaning so long as that meaning does not conflict with the manifest policy of the Act.

Id.

In *Doe on Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 411 (7th Cir. 1986), the Seventh Circuit adopted the reasoning and holding of *Sibley* and held that the plaintiff's Title VII claim should not have been dismissed at the pleading stage, but rather the plaintiff should have been allowed to make a showing that defendant had discriminatorily interfered with her employment opportunities in such a way as would fit within the *Sibley* analysis. The Court also held that "[a] defendant does not have to foreclose all employment opportunities in order to unlawfully interfere with these opportunities." *Doe* at 424.

The only employment relationship present in the case at bar is Hayden's relationship with his corporation, of which he is the sole shareholder. Hayden claims that his employment opportunities with his corporation have been foreclosed by La-Z-Boy's act of, not renewing Hayden's contract. Clearly, however, the only opportunity that has been foreclosed is Hayden's opportunity to sell La-Z-Boy's products as an independent contractor. Hayden may remain employed by his corporation by, for instance, selling the products of a distributor other than La-Z-Boy. An argument similar to Hayden's was advanced in *Mitchell v. Frank R. Howard Memorial Hospital*, 853 F.2d 762, 767 (9th Cir. 1988):

> Finally, Dr. Mitchell argues that the Hospital interfered with his employment relationship with the professional corporation of which he is the sole shareholder. We reject this argument because we believe that the relationship between an individual and his wholly owned professional corporation is not an employment relationship that Congress intended to protect under Title VII. *Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019 (9th Cir. 1983), upon which Dr. Mitchell relies, is clearly distinguishable, *Gomez* involved a corporation that employed a number of doctors who rendered medical services as part of the corporation's group medical practice. *Id.* at 1020. In contrast, Dr. Mitchell is both the sole shareholder and sole employee of his professional corporation.

This court agrees with the reasoning in *Mitchell* and holds that an ADEA plaintiff, like a Title VII plaintiff, cannot establish the existence of a protected employment relationship merely by being an employee of his own corporation of which he is the sole shareholder and sole employee[2]

Even if Hayden is a protected employee, his age discrimination claim still fails because Hayden's proffered evidence of age

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[2]It is worth noting that Hayden's corporation is not governed by the ADEA because it does not have the requisite number of employees.

discrimination fails to create a genuine issue of material fact. Hayden's burden is as follows:

> A plaintiff alleging a violation under the ADEA has the ultimate burden of establishing "that his employer took some adverse employment action . . . against him on the basis of his age" and that this action would not have been taken but for his age. *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 545 (7th Cir. 1988).
>
> A plaintiff may prove age discrimination by either of two methods. She may try to meet her burden head on by presenting direct or circumstantial evidence that age was the determining factor in her discharge. . . . Or, as is more common, she may utilize the indirect, burden-shifting method of proof for Title VII cases originally set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 819, L.Ed.2d 668 (1973), and later adapted to the age discrimination claims under the ADEA.

Weihaupt v. American Medical Association, 874 F.2d 419, 424 (7th Cir. 1989), quoting *Oxman v. WLS-TV*, 846 F.2d 448, 452 (7th Cir. 1988).

Under the burden-shifting method, under which Hayden has elected to proceed, Hayden has the burden of establishing first, as a *prima facie* case, that:

1. He was a member of a protected class (age 50 or older);
2. He was doing his job well enough to meet his employer's legitimate expectations;
3. In spite of his performance, he was discharged; and
4. The employer sought a replacement for him.

Weihaupt, 874 F.2d at 427; *Oxman*, 846 F.2d at 452-52; *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984). Where the plaintiff establishes a *prima facie* case, "a rebuttable presumption arises and the burden shifts to the [defendant] to articulate a legitimate non-discriminatory reason for the discharge." *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 463 (7th Cir. 1986).

The issue in the present case is whether Hayden was doing his job well enough to meet his employer's legitimate expectations. La-Z-Boy has presented evidence showing that Hayden had been having problems meeting job expectations for several years prior to his termination. La-Z-Boy has received serious complaints from Hayden's customers and Hayden's level of sales have not met La-Z-Boy's expectations. Hayden, while admitting that the defendant's evidence is true and accurate, still claims that his poor performance was only a pre-text for La-Z-Boy's act of terminating him.

In response to La-Z-Boy's evidentiary showing, Hayden has calculated that between mid-1987 and 1990, La-Z-Boy's total sales of all products in the West Virginia territory of Frank Stultz, Hayden's successor, grew 6.7%, while the total sales of all La-Z-Boy products in Hayden's Northern Indiana territory grew 7.4%. Hayden claims that this objective evidence proves that he must have been satisfying La-Z-Boy's "legitimate expectations," and thus he has made out a *prima facie* case. Clearly, however, these percentages, standing alone, are not entitled to any weight. As the defendant has pointed out, Hayden has not shown that the West Virginia and Northern Indiana territories were in any way similar. Without such a showing, the court has no way of evaluating the significance of such a small difference in percentage of sales growth over a three and one-half year time period and Hayden has not established a *prima facie* case of age discrimination.

Even assuming that Hayden has established a *prima facie* case and that the burden has shifted to La-Z-Boy "to articulate a legitimate non-discriminatory reason" for declining to renew Hayden's contract, La-Z-Boy has carried its burden. La-Z-Boy has established that it decided to not renew Hayden's contract because of the relatively flat sales in Hayden's territory; Hayden's failure to sell the desired mix of sleepers, sofas, and recliner sofas; customer complaints indicating that Hayden rarely called on some of his customers; an investigation by La-Z-Boy's district sales manager, Dwight Dorwart, which confirmed that Hayden had a poor relationship with many of his customers and failed to conduct sales meetings; and Hayden's failure to submit a plan to

correct these problems despite being placed on three separate six-month periods of probation.

The court finds that this evidence satisfies La-Z-Boy's burden of production and rebuts the presumption of discrimination raised by Hayden's *prima facie* case. Thus, the burden shifts back to Hayden to come forward with sufficient evidence to create a genuine issue of material fact on the question of whether La-Z-Boy's articulated reasons for not renewing his contract were mere pretext for discrimination. *Weihaupt, supra*, 874 F.2d at 428.

> The employee may make this showing of pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. We have stated that the employee may demonstrate that the employer's reasons are unworthy of credence through evidence "showing (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge or (3) that they were insufficient to motivate discharge." *Kier v. Commercial Union Ins. Companies*, 808 F.2d 1254, 1259 (7th Cir. 1987).

Mechnig v. Sears, Roebuck & Co., 864 F.2d 1359, 1364-65 (7th Cir. 1988), quoted in *Weihaupt*, 874 F.2d at 428.

La-Z-Boy has presented uncontroverted deposition testimony showing that its reasons for terminating Hayden were not pretextual. Specifically, the evidence has shown that La-Z-Boy did not rely on a simple mathematical formula based on total units sold in evaluating the performance of its sales representatives; that between 1987 and 1990, West Virginia's, economic statistics were horrible, yet Stultz, Hayden's replacement, was able to do a satisfactory job; and that Northern Indiana was a potentially strong market during 1987 through 1990, yet Hayden was the lowest performer in the region with respect to sales of sleepers, reclining sofas, and sofas. In light of this evidence, Hayden's comparison of his sales percentages to Stultz's sales percentages does not even suggest, let alone tend to establish, that La-Z-Boy's stated reliance on Hayden's performance was a pretext for age

discrimination. Moreover, Hayden's argument that the court should permit this case to go to the jury because La-Z-Boy's reasons for terminating him are "subjective" evidence, while the sales percentages are "objective" evidence, is without merit. In fact, the Seventh Circuit rejected this exact same argument in *Weihaupt:*

> Weihaupt argues that because the qualifications that the AMA determined he lacked were "subjective," the AMA could have easily masked its intent to discriminate against him based on his age.... The mere fact that their beliefs were based on subjective factors fails to establish that their assessment of Weihaupt's skills were made in bad faith.... "A subjective qualification assessment does not convert an otherwise legitimate reason into an illegitimate one."

874 F.2d at 429, quoting *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1427 (7th Cir. 1986).

Conclusion

For the foregoing reasons, defendant's motion for summary judgment on plaintiff's ADEA claim is hereby GRANTED. Further, pursuant to 28 U.S.C. § 1367(c)(3), the court declines to exercise supplemental jurisdiction over plaintiff's state law claims as plaintiff's federal claim is no longer pending before the court. Plaintiff's state law claims are hereby DISMISSED.

Enter: October 28, 1992.

WILLIAM C. LEE

William C. Lee, Judge
United States District Court

Supreme Court, U.S.
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No. 93-1256

In The

Supreme Court of the United States

October Term, 1993

J. WILLIAM HAYDEN,

Petitioner,

v.

LA-Z-BOY CHAIR CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals correctly hold that petitioner, who was the sole stockholder and full-time employee of his own corporation, which in turn was an independent contractor to respondent La-Z-Boy Chair Company, was not covered by the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA")?

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. A1-A12) is reported at 9 F.3d 617. The opinion of the United States District Court for the Northern District of Indiana (*id.* at B1-B11) is unreported.

STATUTE

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, provides:

> It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise *discriminate against any individual with respect to his* compensation, terms, conditions, or privileges of *employment, because of such individual's age.*

29 U.S.C. § 623(a)(1) (emphasis added.)

STATEMENT OF THE CASE

A. Facts

Although petitioner J. William Hayden ("Hayden") asserts that "an artificial label – independent contractor – . . . has been attached to him," Petition at 11, the record shows that he unequivocally conceded his independent contractor status below. Indeed, for many years, he took advantage of this status to reduce his tax liability, and even interposed his own wholly-owned corporation between himself and respondent La-Z-Boy Chair Company ("La-Z-Boy").[1]

Hayden became a commissioned "independent sales representative" for La-Z-Boy, a furniture manufacturer, in 1968. Starting in the 1970s, Hayden and La-Z-Boy entered into a series of written one-year "Independent Sales Representative Agreements." Each Agreement provided that the representative was "not an employee or agent" of La-

[1] La-Z-Boy Chair Company is a Michigan corporation with no parent companies, subsidiaries or affiliates except wholly-owned subsidiaries.

Z-Boy, and that either party could terminate the relationship upon 30 days' notice, with or without cause.

La-Z-Boy had no requirement about the form Hayden's business as an independent sales representative should take. In December 1984, Hayden incorporated "J. William Hayden, Inc.", an Indiana corporation in which he was the sole stockholder, and asked La-Z-Boy to contract with that corporation. La-Z-Boy complied, and in 1985 through 1990, the parties executed written Independent Sales Representative Agreements identifying the parties as La-Z-Boy and J. William Hayden, Inc.

La-Z-Boy paid Hayden a straight commission, and from 1985 forward, paid all commissions to J. William Hayden, Inc. La-Z-Boy did not provide Hayden with an office, reimburse him or his corporation for any business expenses, or provide Hayden with any benefits. La-Z-Boy did not withhold any taxes or social security payments on the commission payments it made to Hayden or his corporation. Nor did La-Z-Boy tell Hayden when to call on customers, require him to submit call reports, or otherwise manage the day-to-day operation of his business.

Hayden testified in deposition that his purpose for incorporating J. William Hayden, Inc. was to reduce his tax liability. After its creation, the corporation received all commission payments from La-Z-Boy and paid Hayden "wages".[2] Hayden was the corporation's only full-time

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[2] Hayden filed tax returns as a self-employed person from the time he became a La-Z-Boy representative until the time he incorporated. From 1985 through 1990, he filed both a corporate tax return and an individual tax return showing himself to be an

employee, although it occasionally hired a part-time secretary and bookkeeper and in one or two years paid Mrs. Hayden for unspecified services. J. William Hayden, Inc. funded Hayden's retirement plan, paid for his insurance, retained and paid accountants and attorneys, and paid all of Hayden's telephone, travel, and entertainment expenses.

La-Z-Boy placed Hayden on six-month periods of probation in 1980, 1986, and 1990. In December 1990, it decided not to renew the Independent Sales Representative Agreement because of long-term concerns over Hayden's slow sales growth, poor dealer relations, poor results in sleeper, sofa and recliner sofa sales, and missed opportunities for developing additional business with his accounts. See Pet. App. at A3 n.1.

Hayden then applied for unemployment compensation benefits from the State of Indiana, certifying that he was an employee of J. William Hayden, Inc. He received the requested benefits for twenty-six weeks. Hayden never made any unemployment compensation claim asserting that he was an employee of La-Z-Boy Chair Company.

B. Proceedings Below

In his complaint, petitioner, an individual, alleged that La-Z-Boy violated ADEA when it decided not to

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officer and employee of J. William Hayden, Inc. Hayden's personal tax returns reflect that his "wages" were paid by his corporation. Hayden has never filed a tax return showing himself to be an employee of La-Z-Boy Chair Company.

renew the Independent Sales Representative Agreement between La-Z-Boy and J. William Hayden, Inc.

Following the completion of discovery, the district court granted summary judgment dismissing Hayden's ADEA claim on two grounds. First, the district court concluded that Hayden, who conceded that he was not an "employee" of La-Z-Boy, was not covered by ADEA. Pet. App. at B7. Second, the district court held that "Hayden's proffered evidence of age discrimination fails to create a genuine issue of material fact." Pet. App. at B7-B8.[3]

The Court of Appeals affirmed. Hayden acknowledged, and the Court of Appeals noted, the line of cases holding that ADEA applies only to employees and applicants for employment, and does not apply to independent contractors. See Pet. App. at A4-A6. Hayden sought to distinguish these cases, relying on cases applying Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), "where an employer 'discriminatorily interferes with an individual's employment opportunities with *another* employer.' " Pet. App. at A6, quoting *Doe* v. *St. Joseph's Hospital of Fort Wayne*, 765 F.2d 411, 423 (7th Cir. 1986), and *Sibley Memorial Hospital* v. *Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (emphasis added). The only "employment" Hayden identified, however, was with his

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[3] In addition to the ADEA claim, Hayden also alleged pendent state law claims of tortious interference with business relations, tortious interference with prospective advantage, and intentional infliction of mental and emotional suffering. After dismissing Hayden's ADEA claim, the district court declined to exercise pendent jurisdiction.

own corporation, of which he was the sole stockholder and sole full-time employee. See Pet. App. at A4-A6, B7.

The Court of Appeals found it unnecessary to decide whether ADEA would apply if a defendant "employer" discriminatorily interfered with a plaintiff's employment with a third party. Instead, it agreed with the district court and the Ninth Circuit in *Mitchell* v. *Frank R. Howard Memorial Hospital*, 853 F.2d 762 (9th Cir. 1988), *cert. denied*, 489 U.S. 1013 (1989), that a defendant's alleged interference with plaintiff's "employment" by his own wholly-owned corporation is not protected by either ADEA or Title VII. Pet. App. at A5-A9.

Finally, the Court of Appeals held that Hayden had failed to preserve any argument that he had "indirect employment" relationships with either La-Z-Boy or the furniture dealers on whom he called – indeed he "specifically disavowed making any arguments to the district court on the basis of [any] alleged 'indirect employment' relationships," Pet. App. at A9-A10. The court further concluded, however, that even if these arguments had been preserved, they were without merit. *Id.* at A9-A12.[4]

ARGUMENT

Petitioner asks this Court to grant review in order to hold that ADEA applies whenever a statutory

[4] The Court of Appeals did not reach the district court's alternative holding that Hayden had failed to create a genuine issue of material fact on the issue of age discrimination. Pet. App. at A3.

"employer" takes an action which has an impact on the "compensation" of any "individual," regardless of whether that individual has an "employment" relationship with anyone. This argument was not preserved below. Rather, petitioner argued that he was covered by ADEA because La-Z-Boy's nonrenewal of the Independent Sales Representative Agreement allegedly interfered with his "employment" by his own wholly-owned corporation.

Even if petitioner's argument had been preserved, however, it could be adopted only by ignoring legislative history and overruling an unbroken line of decisions. Directly in point, in *E.E.O.C.* v. *Zippo Manufacturing Co.*, 713 F.2d 32 (3rd Cir. 1983), the Third Circuit held that Zippo's district sales managers, some of whom were incorporated and some of whom were not, were independent contractors and therefore excluded from the scope of ADEA. The court reasoned:

> [T]he legislative history of [ADEA], 1967 U.S. Code Cong. & Ad. News 2214-27, evinces the clear intent to prohibit "age discrimination by employers against employees and applicants for employment." *Levine* v. *Fairleigh Dickinson University*, 646 F.2d 825, 828 (3d Cir. 1981). Therefore, *if appellants were not Zippo employees, ADEA is not applicable to their cause* and their allegation that Zippo violated ADEA in terminating them because they reached the age of 65 must be rejected.

713 F.2d at 35 (emphasis added).

In *Garrett* v. *Phillips Mills, Inc.*, 721 F.2d 979 (4th Cir. 1983), the Fourth Circuit rejected an ADEA claim asserted

by an independent sales representative because "[a] plain reading of the ADEA indicates that an 'individual' only has a cause of action under this provision if he is an 'employee' at the time of his termination." 721 F.2d at 980.

In *Hickey* v. *Arkla Industries, Inc.*, 699 F.2d 748 (5th Cir. 1983), the plaintiff established a corporation, "Perry Hickey Enterprises" as the vehicle for his sales of Arkla products.[5] The Fifth Circuit concluded that he was not covered by ADEA:

> There is no legislative history to support Hickey's contention that employee status is not required for coverage under the ADEA. Moreover, his argument defies a plain reading of the statute. Whether it would be desirable to include independent contractors within ADEA coverage is clearly a matter for Congress, and emphatically not for the courts, to decide.

699 F.2d at 753 (emphasis added). In accord are *Oestman* v. *National Farmers Union Insurance Co.*, 958 F.2d 303 (10th Cir. 1992) (insurance agent was independent contractor not covered by ADEA); *Frishberg* v. *Esprit De Corp.*, 778 F. Supp. 793 (S.D.N.Y. 1991), *aff'd mem.*, 969 F.2d 1942 (2d Cir. 1992) (self-incorporated sales representative was an independent contractor and not an employee protected under ADEA); *Carney* v. *Dexter Shoe Co.*, 701 F. Supp. 1093 (D.N.J. 1988) (sales representative); *Dake* v. *Mutual of Omaha Ins. Co.*, 600 F. Supp. 63 (N.D. Ohio 1984) (insurance agent). Also see *Fountain* v. *Metcalf, Zimak Co., P.A.*,

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[5] See *Hickey* v. *Arkla Industries, Inc.*, 688 F.2d 1009 (5th Cir. 1982), *vacated*, 699 F.2d 748 (5th Cir. 1983).

925 F.2d 1398 (11th Cir. 1991) (partner in accounting firm not covered by ADEA).

Hayden conceded below that an ADEA plaintiff must have some relevant "employment" relationship, but relied on Title VII cases holding that an "employer" may be liable for discriminatorily interfering with the plaintiff's "employment" with a third party. The Court of Appeals did not resolve this issue. Assuming without deciding that an "employer" could be liable under ADEA for interfering with the plaintiff's employment with a third party, the Court of Appeals correctly held that the relationship between an individual and his wholly-owned corporation is not "employment" protected by either statute. Pet. App. at A6-A10. *Mitchell* v. *Frank R. Howard Memorial Hospital*, 853 F.2d 762 (9th Cir. 1988), *cert. denied*, 489 U.S. 1013 (1989), is squarely on point. In *Mitchell*, a radiologist asserted a Title VII claim against a hospital which terminated an exclusive contract with his professional corporation. The Ninth Circuit held:

> Dr. Mitchell argues that the Hospital interfered with his employment relationship with the professional corporation of which he is the sole shareholder. We reject this argument because we believe that the relationship between an individual and his wholly owned professional corporation is not an employment relationship that Congress intended to protect under Title VII.

853 F.2d at 762, quoted in Pet. App. at A8-A9.

The Ninth Circuit in *Mitchell* distinguished one of its own earlier decisions, *Gomez* v. *Alexian Brothers Hospital of*

San Jose, 698 F.2d 1019 (9th Cir. 1983),[6] upon which Hayden strongly relies. The distinction is directly relevant to this case:

> *Gomez* . . . , upon which Dr. Mitchell relies, is clearly distinguishable. *Gomez* involved a corporation that employed a number of doctors who rendered medical services as part of the corporation's group medical practice. *Id.* at 1020. In contrast, Dr. Mitchell is both the sole shareholder and the sole employee of his professional corporation.

Mitchell, 853 F.2d at 762.

As the Court of Appeals concluded, the other Title VII cases on which Hayden relies are distinguishable on the same basis. See, *e.g.*, *Pardazi* v. *Cullman Medical Center*, 838 F.2d 1155 (11th Cir. 1988) (interference with plaintiff's prospective employment by a professional corporation in which another physician was the principal); *Amarnare* v. *Merrill Lynch, Pierce Fenner & Smith, Inc.*, 611 F. Supp. 344 (S.D.N.Y. 1984) (interference with plaintiff's employment with a third party). The patients by which the plaintiff private-duty nurse in *Sibley* and physician in *Doe* were

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[6] The majority of the courts that have considered the issue, unlike Gomez, hold that Title VII has no application to individuals who are not employees of the "employer." Cases are collected in SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 387 & n.52 (2d ed. Supp., ABA Sect. of Labor & Empl. Law, 1989). Also see *Hishon* v. *King & Spaulding*, 467 U.S. 69 (1984) (Powell, J., concurring) (relationship between law partners not an employment relationship within meaning of Title VII); *Wheeler* v. *Main Hurdman*, 825 F.2d 257 (10th Cir.), cert. denied, 484 U.S. 986 (1987) (partner in accounting firm not an employee and not covered by Title VII, the Equal Pay Act, or ADEA).

allegedly employed were likewise third parties, not corporations owned by the plaintiffs.

As the Court of Appeals correctly held:

> We agree with the Ninth Circuit that Title VII does not protect an individual's "employment relationship" with his wholly owned corporation. To hold otherwise would mean that an independent contractor with no relevant employment relationships with the defendant (or anyone else) could bring himself within the protection of the ADEA simply by incorporating.

Pet. App. at A9. Like *Mitchell*, the other cases directly on point, *Zippo*, *Hickey*, and *Frishberg*, hold that a plaintiff cannot bring himself within ADEA simply by incorporating. Also see *Fountain*, 925 F.2d 1398 (partner in accounting firm, as part owner, not covered by ADEA); *Wheeler* v. *Main Hurdman*, 825 F.2d 257 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987) (partner in accounting firm not covered by ADEA, Title VII, or Equal Pay Act).

Finally, Hayden again attempts to resurrect the argument that he had an "indirect employment" relationship with either La-Z-Boy or the furniture dealers on which he called. Petition at 11. The Court of Appeals correctly held that Hayden failed to preserve any "indirect employment" argument, Pet. App. at A9-A10, and that in any event this argument is without merit. *Id.* at A10-A12. For example, the facts in *Zippo* bear a striking resemblance to the facts of this case. 713 F.2d at 35. The *Zippo* court, applying the "hybrid 'right to control/economic realities' test applied in Title VII cases," held that the district

managers were independent contractors as a matter of law. 713 F.2d at 37. In accord are *Eyerman* v. *Mary Kay Cosmetics*, 967 F.2d 213, 218 (6th Cir. 1992) (dismissing a handicap discrimination claim[7] because commissioned national sales director was an independent contractor); *Hickey*, 699 F.2d at 748 (self-incorporated sales representative was independent contractor).[8]

Nor (even if it had been preserved) would Hayden's theory that La-Z-Boy interfered with his relationship with furniture dealers bring him within ADEA. The "interference" is simply refusal to allow Hayden to sell La-Z-Boy products. As the Court of Appeals noted, "Hayden conceded in his deposition that he had no actual or prospective contractual relationship with these furniture dealers and that he remains free to sell these same dealers any (non-La-Z-Boy) furniture or other products." Pet. App. at A12. In *Mitchell*, the Ninth Circuit rejected a Title VII plaintiff's virtually identical claim, holding that the "traditional physician/patient relationship is not one of employer/employee." 853 F.2d at 767. In accord is *Beverly* v. *Douglas*, 591 F. Supp. 1321, 1328 (S.D.N.Y. 1984). The

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[7] Eyerman's claim was brought under Ohio Rev. Code § 4112.02, which contains language similar to Title VII. See 967 F.2d at 217.

[8] *Mitchell* v. *Tenney*, 650 F. Supp. 703 (N.D. Ill. 1986), cited by Hayden, is readily distinguishable from the present case because the defendant, among other things, provided the plaintiff with medical insurance and a place of business and closely regulated his working hours. See Pet. App. at A11-A12.

Court of Appeals correctly rejected Hayden's argument, and its ruling need not be further reviewed.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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PETITIONER'S REPLY BRIEF

ARGUMENT

The respondent's brief in opposition confirms the reasons that the Court should hear this case. We say this because of four separate reasons. First, respondent simply ignores the significance of the definition of "employ" that has been adopted in the Fair Labor Standards Act (29 U.S.C. § 201 et seq.) The act defines that term to include "suffer[ing] or permit[ing] to work." (29 U.S.C. § 203 (g)). The Court not long ago recognized that this definition "stretches the meaning of "employee" to cover some parties who might not qualify as such under a strict application of traditional agency law principles." (*Nationwide*

Mutual Insurance Co. v. Darden, 112 S.Ct. 1344, 1350 117 L.Ed.2d 581 (1992)).

We pointed in our initial argument (p. 6) that the Age Discrimination in Employment Act ("ADEA") (29 U.S.C. § 621 et seq.) under which this case was brought is an amendment to the FLSA (29 U.S.C. § 626 (b)) and remedies for ADEA were specifically adopted from FLSA (ibid.) Accordingly, the "textual asymmetry" which the Court found precluded application of this definition to an ERISA case in *Darden*, supra, 112 S.Ct. at 1350 is not present here. Respondent did not address this statutory definition in their opposition arguments. Neither have the earlier ADEA decisions which we discussed in our arguments (pp. 4-5) and respondent discussed in theirs (pp. 5-7).

As we stated in our initial argument (p. 6), "[s]omeone – [petitioner's] customers, his supplier (respondent) or his corporation – was suffering or permitting him to work. Therefore, he was employed by them." Then, through an act solely undertaken by respondent, he was no longer employed. The ADEA is a concededly important statute and to allow this transparent anomaly in its interpretation is to us troublesome, particularly in light of the nearly quarter of a century that petitioner has devoted to their services.

Secondly, respondent misconstrues, as did the court of appeals, the proper standard for finding that an issue has been preserved in the lower courts. This question arises with respect to one of petitioner's arguments – that respondent had indirectly interfered with petitioner's relationships with his customers by terminating him. A

party "opposing a summary judgment motion must inform the trial judge of the reasons legal or factual, why summary judgment should not be entered." (*Liberles v. County of Cook*, 709 F.2d 1122, 1126 (7th Cir. 1983).) Petitioner did this by informing the court of a certain line of cases. (Pet., A-10). This line of authority was consistent with petitioner's complaint which alleged that he "had developed ongoing relationships with customers in his sales territory" and found himself in the position of being completely controlled in his access to them and the employment opportunities which they represented" by respondent. (Pet., p. 3). (*Baker v. McNeil Island Corrections Center*, 859 F.2d 124 (9th Cir. 1988) (Defendant corrections department indirectly interfered with plaintiff's being hired by state librarian.))

Thirdly, respondent's arguments, which the court of appeals accepted, that his employment relationships have not been interfered with because he can still sell other companies products (Resp., p. 12) is simply not the law. (*Gomez v. Alexian Brothers of San Jose*, 698 F.2d 1019, 1021 (9th Cir. 1983) and *Mitchell v. Tenney*, 650 F.Supp. 703 (N.D.Ill. 1986) (The distinguishing features cited by respondent between this case and *Mitchell* (Resp., ftn. 10) do not even facially relate to the question of whether the availability of one set of employment opportunities totally insulates an action for the discriminatory loss of another one.))

Fourthly, respondent does not even address the petitioner's point (Pet. p. 11) that, when Congress has wanted to exclude independent contractors from a statute, such

as the National Labor Relations Act, it has done so explicitly. (29 U.S.C. § 152 (3)). Rather, than advance the argument any on this point, respondent makes statements such as respondent "unequivocally conceded his independent contractor status below" (Resp., p. 2) begging the question of whether or not a conceded status should always be sufficient to insulate one from legal scrutiny for their acts.

CONCLUSION

For these reasons and those set forth in the original petition, we request that the petition be granted.

Respectfully submitted,

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